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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,

and

UNIVERSITY OF MARYLAND,

Petitioners,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

ALFRED L. SCANLAN
JOHN TOWNSEND RICH
JAMES R. BIEKE *
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Respondents

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that the University of Maryland's policy of denying the benefits of in-state status to aliens holding nonimmigrant "G-4" visas (under 8 U.S.C. § 1101(a)(15)(G)(iv)) even when they are domiciled in Maryland, while granting such benefits to citizens and immigrant aliens domiciled in Maryland, creates a classification based on alienage that is subject to "strict judicial scrutiny" and violates the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the courts below correctly held that the University's above-mentioned policy with respect to aliens holding G-4 visas interferes with Congress's exclusive control over immigration, in violation of the Supremacy Clause of the Constitution, by imposing discriminatory burdens on such visaholders domiciled in Maryland.

3. Whether the courts below correctly held that, for the two-year period between the District Court's initial order and the University's "Clarifying Resolution" of June 23, 1978, the University's policy of refusing to allow aliens holding G-4 visas to prove Maryland domicile for the purpose of obtaining the benefits of in-state status, while at the same time basing the award of such status on Maryland domicile, created an irrebuttable presumption in violation of the Due Process Clause of the Constitution.

4. Whether the courts below correctly held that the University is required to make refunds of tuition differentials to plaintiffs and members of their class for the period between the date of the first injunctive order in 1976 and the date of the most recent injunctive order in 1980, on the ground that the University had agreed to

such refunds as a condition of a stay pending appeal and thus waived any Eleventh Amendment immunity.*

* Though not presented in the petition, the following issues would also have to be resolved against respondents for the judgment of the Court of Appeals to be reversed: (1) whether the University's above-mentioned policy with respect to aliens holding G-4 visas violates the Equal Protection Clause even if "strict judicial scrutiny" were not appropriate; and (2) whether the University's above-mentioned policy with respect to aliens holding G-4 visas violates the Supremacy Clause of the Constitution by interfering and conflicting with the objectives of international agreements to which the United States is a party.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Juan Carlos Moreno *et al.* respectfully request that the petition for writ of certiorari filed by petitioners the University of Maryland and its President, John S. Toll, (hereinafter "the University") be denied.

STATEMENT

The University's statement of the case (Pet. 4-14) is argumentative rather than objective. The arguments set forth therein will be answered in the Argument of this brief. A concise and objective statement of the relevant facts and of the history of this case may be found in the Court of Appeals' opinion of March 26, 1981 (App. 2a-5a) and in the District Court's opinion of October 31,

1979 (App. 11a-20a). We merely highlight here the relevant facts demonstrating that, contrary to the University's assertions, this case does not present any substantial federal question meriting review by this Court.

The University attempts to paint this case as involving high stakes and important issues. It claims, for example, that this case affects "most public colleges and universities in the United States" (Pet. 14), would "permit *all* categories of nonimmigrants including foreign students (F & J visaholders) to be eligible for in-state benefits" (*id.* n.13), and "raises novel and important questions of constitutional law that transcend the huge amounts of money at stake for public colleges and universities across the nation" (*id.* 29). These assertions are untrue and misleading. This case involves only a limited class of nonimmigrant aliens residing in discrete sections of the country, and raises only limited issues. It does not involve or have implications for all categories of nonimmigrant aliens. Rather, it affects only the holders of "G-4" visas —*i.e.*, officers or employees of public international organizations and their immediate families (most, if not all, of whom reside in the Washington, D.C., and New York City metropolitan areas)—and a few other categories of nonimmigrant visaholders whom this Court has already held are capable of being domiciled in the United States. The basic issue in this case is whether such individuals, if domiciled in Maryland, may be barred from obtaining the benefits of in-state status at the University of Maryland when all other domiciliaries of Maryland are allowed to obtain those benefits. Questions regarding other nonimmigrant aliens (such as foreign students), who are precluded from establishing Maryland domicile by virtue of federal law, are not presented by this case.

The University of Maryland's In-State Policy at issue here (App. 167a-171a) governs the award of in-state status for purposes of obtaining the lower, in-state tuition

and fee rates at the University and for purposes of obtaining more favorable treatment for admission to the University. That policy allows citizens and immigrant aliens to obtain such in-state status (for themselves and their dependents) upon a showing that they are domiciled in Maryland, but it prohibits all nonimmigrant aliens from obtaining in-state status. Obviously, such a clear exclusion of a class of aliens from state-granted benefits must have some justification. Until the University's "Clarifying Resolution" of June 23, 1978 (App. 172a-175a), the University attempted to justify the exclusion on the ground that its In-State Policy was based on domicile and that the reason nonimmigrant aliens were excluded was that they could not be domiciled in Maryland under state law. See this Court's opinion in *Elkins* v. *Moreno*, 435 U.S. 647, 658-60 (1978) (App. 114a-116a).

The respondents—dependents of employees of international banks (specifically, the Inter-American Bank and the International Bank for Reconstruction and Development)—brought a class action in 1975 challenging that policy, as applied to them, on due process, equal protection, and Supremacy Clause grounds. They argued that they and their fathers could be and were in fact domiciled in Maryland, even though they and their fathers held nonimmigrant G-4 visas and even though their fathers were exempt from income taxes on their bank salaries under the international agreements establishing the organizations and under federal statute (App. 59a-62a).[1] The

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[1] Nonimmigrant aliens are permitted to enter the United States under twelve different classifications, which correspond to the different visas that they hold (8 U.S.C. § 1101(a)(15)(A) through (L)). The G-4 category is for "officers, or employees of . . . international organizations [recognized under the International Organizations Immunities Act (IOIA), 59 Stat. 669, 22 U.S.C. § 288 *et seq.*], and the members of their immediate families" (8 U.S.C. § 1101(a)(15)(G)(iv)). These organizations are established pur-

University argued, however, that G-4 visaholders are necessarily precluded by the terms and conditions of their visas from being domiciled in Maryland (App. 79a). In its decision of July 13, 1976, the District Court rejected that contention, holding that nothing in either federal immigration law or the Maryland law of domicile prevented a G-4 visaholder from being domiciled in Maryland (App. 79a-88a). The court concluded that the University's policy created an irrebuttable presumption of non-domicile that was not necessarily true for G-4 visaholders, and thus denied those visaholders due process of law under *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (App. 88a-89a, 98a). The Court of Appeals affirmed (App. 101a-102a).

On writ of certiorari, this Court confirmed that *Vlandis* squarely governed this case, and it then proceeded to examine the question whether G-4 visaholders could be domiciled in Maryland. *Elkins* v. *Moreno*, *supra*, 435 U.S. at 660-62 (App. 116a-118a). The Court held that, unlike most nonimmigrant aliens, G-4 visaholders (along with a few similar categories of nonimmigrant visaholders) were not precluded by federal law from being domiciled in the United States. 435 U.S. at 663-68 (App. 119a-124a). The Court observed that with respect to most of the twelve major categories of nonimmigrant aliens listed at 8 U.S.C. § 1101(a)(15)(A)-(L), Congress expressly con-

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suant to treaties and international agreements to which the United States is a party. Under those agreements, as well as by virtue of the IOIA, the employees of the organizations who are not U.S. citizens are exempt from federal, state, and local income taxes on their salaries from such organizations. See Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397, Art. XI, § 9(b); Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), 60 Stat. 1440, T.I.A.S. No. 1502, Art. VII, § 9(b); International Organizations Immunities Act, § 4(b), 59 Stat. 670, amending Internal Revenue Code, now codified at 26 U.S.C. § 893. However, they pay all other applicable federal, state, and local taxes.

ditioned admission to the United States on the alien's intent not to abandon his foreign residence and, by implication, not to establish domicile in the United States. 435 U.S. at 665-66 (App. 121a-122a). For example, foreign students admitted pursuant to 8 U.S.C. § 1101 (a) (15) (F) are defined as "having a residence in a foreign country which [they have] no intention of abandoning." By contrast, the Court noted, G-4 visaholders and a few other limited categories of nonimmigrant visaholders—such as those who enter under certain treaties of commerce (§ 1101 (a) (15) (E)) and certain foreign media representatives (§ 1101 (a) (15) (I))—were exempted by Congress from such conditions. Accordingly, the Court stated, Congress "was willing to allow [such] nonrestricted nonimmigrant aliens to adopt the United States as their domicile." 435 U.S. at 666 (App. 122a).

Having resolved that question of federal law, this Court certified to the Maryland Court of Appeals the question whether G-4 visaholders were "incapable *as a matter of state law* of becoming domiciliaries of Maryland." 435 U.S. at 669 (App. 124a-125a) (emphasis added). That court, in *Toll* v. *Moreno*, 284 Md. 425, 397 A.2d 1009 (1979) (App. 137a), answered the certified question "No," stating that "nothing in the general Maryland law of domicile renders G-4 visaholders, or their dependents, incapable of becoming domiciled in this state" (App. 156a).

Thus, it is clear that G-4 visaholders can be domiciled in the United States and in Maryland. Of course, not every G-4 visaholder residing in Maryland will be domiciled there; such individuals must still meet the general test for Maryland domicile (based on intent) discussed by the Maryland Court of Appeals in *Toll* v. *Moreno*, *supra* (App. 149a-153a). The important fact is that these visaholders, unlike most nonimmigrants, can establish domicile in Maryland, and that it is this limited class of

nonimmigrant visaholders, not the general class of nonimmigrants, with which this case is concerned.[2]

The University, however, did not simply accept these decisions and apply its test of domicile to all students (or their parents) who could be domiciled in Maryland, including the G-4 visaholders. Rather, on June 23, 1978, the University adopted a "Clarifying Resolution" (App. 172a-175a). That resolution did not purport to amend the In-State Policy; indeed, it specifically "reaffirmed" that policy (¶ 4). It stated, however, that that policy had adopted a definition of domicile that excluded all nonimmigrant aliens (even those who could in fact be domiciled in Maryland under federal law and Maryland law) (¶ 2), and that that policy served a number of purposes and interests "whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law" (¶ 3). Obviously, this resolution was not necessary to exclude the great majority of nonimmigrants from in-state status; they would have been excluded under an even-handed test of domicile. Rather, the resolution affected only the G-4 and similar visaholders who could otherwise have qualified for in-state status under the test of domicile applicable to citizens and immigrant aliens.

When the case returned to this Court from the Maryland Court of Appeals, the petitioners advised this Court of the adoption of the Clarifying Resolution. Without further briefing, this Court then issued its *per curiam* opinion in *Toll* v. *Moreno*, 441 U.S. 458 (1979) (App. 157a-160a), vacating the judgment of the Court of Appeals and remanding the case to the District Court "for further consideration in light of our opinion and judg-

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[2] The University asserts that there were 493 nonimmigrant students registered at the University in the fall of 1979 (Pet. 6). In fact, the correct number is 554 (C.A. Jt. App. 189). Of these, only 72 were G-4 visaholders (*id.*).

ment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U.S. at 462 (App. 160a).

Following remand from this Court, the District Court and the Court of Appeals again held in favor of the respondents in the decisions of which the University now seeks review.

SUMMARY OF ARGUMENT

Contrary to the University's claims, the issues involved in this case are of limited significance and were correctly decided by the courts below.

(1) The courts below held that the University's In-State Policy, both before and after the Clarifying Resolution, violates the Equal Protection Clause. That holding rests firmly on the established principle that state classifications based on alienage are inherently suspect and subject to strict judicial scrutiny. This principle applies even when the enactment discriminates only against a certain sub-class of aliens rather than against all aliens, so long as the enactment "is directed at aliens and . . . only aliens are harmed by it." *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977). The University's In-State Policy falls within this proscription. It allows citizens and immigrant aliens who are Maryland domiciliaries to obtain in-state status, but it denies such status to G-4 and similar nonimmigrant visaholders who are likewise Maryland domiciliaries. Even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and harms *only* aliens.

The University does not deny that its In-State Policy cannot withstand a test of strict scrutiny. Rather, it contends that the strict-scrutiny test should not apply to discrimination against nonimmigrant aliens, and it

advances a number of reasons why such discrimination against nonimmigrants generally should be judged by the more lenient "rational basis" test. These arguments, however, ignore the fact that the constitutional defect in the University's policy is not that it denies the benefits of in-state status to all nonimmigrant aliens, but that it denies such benefits to the G-4 and similar nonimmigrant aliens *who are Maryland domiciliaries.* They are the only individuals harmed by the University's policy. This case thus does not present a major test of the States' power to impose restrictions on nonimmigrant aliens generally; it simply involves a situation in which a state university has decided to treat a very few of the state domiciliaries less favorably than other domiciliaries solely because they hold nonimmigrant alien visas. At least in these limited circumstances, there is no basis for upsetting application of the strict-scrutiny test.

(2) The courts below also held that the University's In-State Policy encroached upon the exclusive federal power over immigration and naturalization, in violation of the Supremacy Clause, by imposing on a sub-class of aliens domiciled in the United States discriminatory burdens in addition to the conditions imposed by Congress. The University claims that this holding fashions a rule under which an automatic violation of the Supremacy Clause follows from every denial of equal protection to nonimmigrant aliens. As we will show, the courts below constructed no such *per se* rule, but merely imposed the standards enunciated in opinions of this Court. But even if the holdings below had established such a rule, that would present no question of practical importance warranting this Court's review, because every state enactment subject to such a rule would by definition already be unconstitutional under the Equal Protection Clause.

(3) The University also challenges the holding of the courts below that, until the June 23, 1978 Clarifying Resolution, the University's In-State Policy created an irrebuttable presumption that denied G-4 visaholders due process of law under the principles of *Vlandis* v. *Kline*, *supra*. As we demonstrate below, this Court in *Elkins* v. *Moreno*, *supra*, held that the present case falls squarely within *Vlandis;* and its decision in *Toll* v. *Moreno*, *supra*, which remanded the case for consideration of the intervening Clarifying Resolution, did not decide to the contrary. In any event, regardless of the merits of the due process question, that question is not of any substantial importance here, since the policy was held unconstitutional on other grounds and since the due process holding applies, as an alternative ground, only to a two-year period prior to June 23, 1978. Since it is now clear that the denial of in-state status to G-4 visaholders cannot be justified on the ground that they cannot be domiciled in the State, the irrebuttable-presumption issue should not arise again in the present context. Accordingly, there is no reason for this Court to grant certiorari in this case to decide whether to overrule *Vlandis*, as the University asks.

(4) In its order of May 30, 1980 (App. 48a-50a), the District Court reaffirmed its order of July 13, 1976, and ordered the University, as an implementation of the conditions of the initial stay pending appeal (App. 99a-100a), to make refunds of the difference between out-of-state and in-state tuition and charges to any member of the respondent class who could show Maryland domicile (under state law principles) for the period from July 13, 1976, to date. As we will show, the University's claim that this refund order violates the Eleventh Amendment was properly rejected by both courts below. In any event, since the issue turns on the construction of representations made by the University in this case to obtain a stay pending appeal, it presents no question of general significance meriting review by this Court.

ARGUMENT

I. The Lower Courts' Holding That the University's Policy Violates the Equal Protection Clause Is Based on Established Precedent and Does Not Present a Substantial Question Warranting Review.

It is by now well established that state classifications based on alienage are inherently suspect and are "subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971). See also *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 601-02 (1976); *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7. In *Nyquist*, this Court made clear that this principle applies even when the state enactment discriminates only against a sub-class of aliens. In that case, New York contended that a state statute which barred financial assistance for higher education to aliens who had neither applied for citizenship nor submitted a statement of intent to do so "should not be subjected to . . . strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous' class of aliens" and "does not distinguish between citizens and aliens *vel non*." 432 U.S. at 7-8. The Court rejected that argument, pointing out that the statute "is directed at aliens and that only aliens are harmed by it, [and] [t]he fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate against the class." *Id.* at 9. Likewise, the state statute struck down in *Graham* v. *Richardson*, *supra*, had not prohibited *all* aliens from obtaining welfare benefits, but only those who did not meet a durational residency requirement.

As the courts below recognized, the University's In-State Policy falls directly within the principles of those decisions. That policy on its face treats a sub-class of aliens—G-4 and other nonimmigrant aliens—differently

from citizens and immigrant aliens. Under it, citizens and immigrant aliens are granted in-state status if they can show domicile in Maryland. Nonimmigrant aliens, however, are flatly barred from becoming classified as in-state, even though in fact some subcategories of nonimmigrants—namely, G-4 and similar visaholders—can be domiciled in Maryland under state and federal law.

Since the University, in attempting to justify this discrimination, refers repeatedly to the denial of in-state benefits to nonimmigrant aliens *in general*, it is important to emphasize that the effect of the discrimination worked by the policy falls only on nonimmigrant aliens *who are domiciled in Maryland*. Respondents have never contended that the University's policy of denying in-state benefits to nonimmigrant aliens is unconstitutional as applied to nonimmigrant visaholders who are unable as a matter of federal law to establish domicile in a State of this nation. Such nonimmigrants are in no way harmed by the University's policy, because even if they were accorded equal treatment with citizens and immigrant aliens—*i.e.*, subject to a test of domicile—they would invariably fail to qualify for in-state status. Rather, the disadvantaged class consists of the G-4 and few other categories of nonimmigrant visaholders who, under the principles of this Court's decision in *Elkins*, are capable of establishing domicile in Maryland. See pp. 4-5, *supra*. They, unlike most nonimmigrants, would enjoy the benefits of in-state status if they were treated on an equal basis with other Maryland domiciliaries who happen to be U.S. citizens or immigrant visaholders. Thus, the classification established by the University's policy is between two kinds of Maryland domiciliaries: citizens and immigrant aliens who are domiciled in Maryland are allowed to obtain in-state status; G-4 and similar nonimmigrant aliens *who are likewise so domiciled* under state law are not. The latter are the only Maryland domiciliaries precluded from prov-

ing their domicile and thus obtaining in-state status. As in *Nyquist*, even though this classification does not harm *all* aliens, it is directed at a sub-class of aliens and disadvantages *only* aliens. Hence, the classification is a suspect classification based on alienage and is accordingly subject to strict judicial scrutiny (which the University admits the policy cannot withstand).

In an effort to avoid the impact of this analysis, the University contends that the strict-scrutiny standard was erroneously applied by the courts below, because the individuals discriminated against hold nonimmigrant rather than permanent resident visas. It claims that this Court should grant certiorari to hold that discrimination against nonimmigrant aliens should not be judged by a strict-scrutiny standard. However, none of the reasons advanced by the University in support of its position provides any justification for this Court to review the question in the context of the present case.

The first reason advanced to show why strict scrutiny is not appropriate here is that all prior cases in which this Court has applied that standard have involved a statute or practice that discriminated against permanent resident aliens. The University then claims that this Court's opinions in those cases suggest that its decisions to apply strict scrutiny were limited to discrimination against immigrant aliens (Pet. 15-17). That contention is erroneous. It is true that the above-cited cases applying strict scrutiny involved either aliens in general or permanent resident aliens and that the Court did at times refer to the attributes of permanent resident aliens. But that simply reflects the fact that the enactments in those cases had no practical effect on the great majority of nonimmigrant aliens and were not being challenged by nonimmigrants. See, *e.g.*, *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 4 ("Since many aliens, such as those here on student visas, may be precluded by federal law from es-

tablishing a permanent residence in this country . . . the bar of [the challenged statute] is of practical significance only to resident aliens").[3] This Court has never suggested in any of its cases that different modes of analysis apply to alienage-based classifications depending upon the visa status of the aliens discriminated against. Rather, recognizing that aliens constitute a " 'discrete and insular' minority" for whom "heightened judicial solicitude is appropriate" (*Graham* v. *Richardson, supra*, 403 U.S. at 372), the Court has held that classifications based on alienage are suspect and subject to strict scrutiny, and that a classification is based on alienage for these purposes, even if it does not harm all aliens, if, as here, it is directed at aliens and harms only aliens (*Nyquist* v. *Mauclet, supra*, 432 U.S. at 9). This analysis is not limited to immigrant aliens. Indeed, the Court's references to the attributes of permanent resident aliens, cited by the University (Pet. 16), were made in the context of determining whether the enactments in question could survive strict scrutiny, not whether strict scrutiny applied. *Graham* v. *Richardson, supra*, 403 U.S. at 376; *Nyquist* v. *Mauclet, supra*, 432 U.S. at 12. See also *Sugarman* v. *Dougall, supra*, 413 U.S. at 645.

It must be remembered, moreover, that in the present case the discrimination worked by the University's policy falls only on the G-4 and similar nonimmigrant visaholders who are similarly situated to citizens and immigrant aliens with respect to the establishment of domicile in this country and in Maryland. They may live in the State for many years and contribute to the economic

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[3] Similarly, since most nonimmigrant visaholders (unlike G-4 and similar nonimmigrant aliens) are present in this country on only a temporary basis for limited purposes, they would not ordinarily be in a position to apply for a license to practice law (*In re Griffiths, supra*), for state civil service employment (*Sugarman* v. *Dougall, supra*), or for welfare benefits (*Graham* v. *Richardson, supra*).

growth of the State through the payment of all taxes except taxes on their salaries from the international organizations.[4] They are, indeed, domiciled in the State under the State's own law. At the least, therefore, discrimination against these aliens is appropriately judged under a strict-scrutiny test, as the courts below held. The District Court stated that, while these nonimmigrant aliens are not admitted as permanent resident aliens for visa purposes, they may be classified as "resident aliens" for present purposes if their place of general abode (*i.e.*, their domicile) is within the United States (App. 36a-37a), and that States must justify classifications discriminating against such "resident aliens, whether immigrant or nonimmigrant, under a strict scrutiny standard" (App. 38a).[5]

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[4] As noted above (n.1, pp. 3-4), the G-4 visaholders' exemption from taxes on their international bank salaries is established by international agreements to which the United States is a party, as well as by federal statute. This tax exemption was adopted for the benefit of the international organizations and their member nations, and cannot be waived by individual employees. See 41 Op. Atty. Gen. 170, 172-73 (1954). That exemption is clearly an insufficient reason to lower the equal protection standard applicable to state action discriminating against aliens who are domiciled in the State. This is particularly clear since the University makes no effort to classify other domiciliaries of the State—*i.e.*, citizens and immigrant aliens—on the basis of their tax liability or payments.

[5] It is for this reason that the arguments of Professor Rosberg, so heavily relied on by the University, do not support its contention. Rosberg makes clear that his thesis is premised on the fact that nonimmigrants "cannot have an intention of remaining here indefinitely . . . ." G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, S. Ct. Rev. 275, 312 (1977). That article was written prior to, and does not take account of, this Court's holding in *Elkins* that G-4 and a few similar categories of nonimmigrant visaholders *can* have the intention of remaining in the United States indefinitely. It should also be noted that, in a portion of his article not quoted by the University, Rosberg cites the District Court's initial decision in this case with approval. *Id.* at 313 n.143.

The second argument advanced by the University for why strict scrutiny should not apply is that, since many aliens are eligible for in-state benefits, "it is irrational to contend that the in-state policy denies its benefits on the basis of alienage" (Pet. 17). In *Nyquist* the petitioner similarly contended that the statute in question distinguished "only within the 'heterogeneous' class of aliens" and not "between citizens and aliens *vel non*." 432 U.S. at 8. As noted above, this Court expressly rejected that argument, stating that "[t]he important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." 432 U.S. at 9. Here, as in *Nyquist*, although not all aliens are barred from in-state benefits by the University's policy, the policy is directed at a sub-class of aliens and only aliens are harmed by it. Hence, strict scrutiny is the applicable standard.

The University's third argument is that strict scrutiny should not apply because "in-state tuition and fees are not 'necessities of life'" (Pet. 18). Again, this argument was raised in *Nyquist:* "Appellants also seem to assert that strict scrutiny should not be applied because aid to education does not deny an alien 'access to the necessities of life.'" 432 U.S. at 8 n.9. This Court rejected that contention, noting first that the statement of purpose in the statute itself referred to higher education as a "necessity," and stating further that

> "in any event, the Court noted in *Graham* v. *Richardson* . . . that classifications based on alienage 'are inherently suspect and are therefore subject to strict scrutiny *whether or not a fundamental right is impaired.*'" (Emphasis added.) *Id.*

The University seeks to avoid this result by citing the Chief Justice's statement in *Foley* v. *Connelie*, 435 U.S.

291, 295 (1978), that the exclusions in prior cases applying strict scrutiny, including *Nyquist*, "struck at the noncitizen's ability to exist in the community," and by claiming that only a "dollar differential, not a right to education, is at stake here" (Pet. 18). In fact, however, as the Chief Justice recognized in *Foley* (435 U.S. at 295 n.4), the "necessity" referred to in *Nyquist* was the necessity of higher education, not of the aid to education. The actual benefits involved in *Nyquist*—namely, loans, tuition assistance, and scholarships in aid of higher education—are analytically indistinguishable from the financial benefits of lower tuition and fee rates at the University of Maryland. Moreover, the benefits of in-state status at the University of Maryland are not limited to a "dollar differential," but also encompass more lenient admission standards, which can be crucial to the students' ability to enter the University at all. In any event, as this Court recognized in *Nyquist*, classifications based on alienage are subject to strict scrutiny regardless of the nature of the underlying right or benefit in question.[6]

Fourth, the University asserts, without citation of precedent, that strict scrutiny should not apply here because its policy is "consistent with the purposes of federal immigration law," since "the Federal Government has no policy in favor of according educational benefits to nonimmigrants—in fact, just the opposite" (Pet. 18, 19). The simple answer to this contention is that, as this Court has made clear, "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not

[6] The Court in *Foley* recognized an exception to this rule where aliens are excluded from a "governmental function" involving "discretionary decision-making, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. See also *Ambach* v. *Norwich*, 441 U.S. 68 (1979). That "governmental function" exception obviously does not apply here.

shared by the States." *Nyquist* v. *Mauclet*, *supra*, 432 U.S. at 7 n.8. See also *Mathews* v. *Diaz*, 426 U.S. 67, 79-87 (1976). Thus, the fact that Congress or the federal government may have drawn certain lines respecting aliens in the distribution of benefits implies nothing about a State's power to act in a similar fashion.[7] Indeed, the Court in *Nyquist* made clear that it is not even permissible for a State to attempt to justify a policy by reference to concerns touching upon immigration or naturalization. 432 U.S. at 10.

Thus, the University has presented no valid reason for this Court to review the lower courts' application of strict scrutiny in the context of the present case.[8] This issue, moreover, does not appear to have any broad or far-reaching effect. As noted above, it does not affect the majority of nonimmigrants, but only the G-4 and few similar categories who can be domiciled in Maryland. There are not many such visaholders at the University of Maryland (see n.2, p. 6, *supra*); and, at least as to G-4's, very few, if any, are likely to reside outside the Washington, D.C., and New York City areas. To our knowledge, there is no other university in those

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[7] As a matter of fact, the University is in error in asserting that the statute upheld in *Mathews* v. *Diaz* drew a line between citizens and immigrants, on the one hand, and nonimmigrants, on the other (Pet. 19). That statute denied Medicare benefits not only to nonimmigrants but also to some immigrants (*i.e.*, those who had not resided in the United States for five continuous years immediately preceding application for benefits).

[8] While we do not argue the point here, we preserve our position that even if the classification created by the University's In-State Policy were not subject to strict scrutiny, it is still invalid as essentially arbitrary and not rationally related to the interests advanced to support it, as applied to the G-4 (and similar) aliens disadvantaged by the policy. While the District Court suggested that the University's policy would "arguably" meet a rational-basis test (App. 42a), it did not decide that question in the University's favor.

areas with a policy similar to the University of Maryland's In-State Policy in its treatment of G-4 visaholders. Furthermore, we are not aware of any other significant state restrictions, outside the university context, treating such G-4 (and similar) visaholders domiciled in the State differently from citizens and immigrant visaholders so domiciled. The equal protection issue, then, both was correctly decided and is of limited impact, and thus does not warrant this Court's review.[9]

II. The Lower Courts' Holding That the University's Policy Violates the Supremacy Clause Does Not Present a Substantial Question Warranting Review.

The courts below held that the University's In-State Policy constitutes an encroachment on the exclusive federal power over, and policies involving, immigration and naturalization, in violation of the Supremacy Clause. Contrary to the University's argument, that holding does

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[9] The University refers in a footnote to *Cabel* v. *Chavez-Salido, prob. juris. noted,* No. 80-990, 49 U.S.L.W. 3663 (Mar. 9, 1981), and *Plyler* v. *Doe, prob. juris. noted,* No. 80-1538, 49 U.S.L.W. 3824 (May 4, 1981), although it rightly recognizes that those cases are not relevant to the instant case (Pet. 20 n.19). The *Cabel* case involves the applicability of the "governmental function" exemption to the strict-scrutiny standard (which exception was enunciated in *Foley* v. *Connelie, supra*) to a state statute requiring U.S. citizenship to be a "peace officer." See 490 F. Supp. 984 (C.D. Cal. 1980). As noted above (n.6, p. 16), that exception clearly does not apply here. The *Plyler* case (consolidated in this Court with *Texas* v. *Certain Named & Unnamed Undocumented Alien Children, prob. juris. noted,* No. 80-1934, 49 U.S.L.W. 3930 (June 15, 1981)) involves the denial of free public education to illegal aliens—which the Fifth Circuit held to be a violation of the Equal Protection Clause under either a strict-scrutiny or a rational-basis standard. 628 F.2d 448, 458 (1980). That case does not deal with the question of the standard to be applied to an enactment discriminating against a class of *legal* aliens—which is an entirely different matter in fact and law. Even if this Court reversed the decision in *Plyler,* that action would have no effect on the outcome of the present case.

not present a substantial issue meriting this Court's review.

It has been established by several decisions of this Court that state laws or regulations "which impose discriminatory burdens [not created by Congress] upon the entrance *or residence* of aliens lawfully within the United States conflict with [the] congressionally derived federal power to regulate immigration . . . ." *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419 (1948) (emphasis added). See also *DeCanas* v. *Bica*, 424 U.S. 351, 358 n.6 (1976); *Graham* v. *Richardson*, *supra*, 403 U.S. at 378-79. In *Examining Board* v. *Flores de Otero*, *supra*, 426 U.S. at 602, the Court explained:

> "The underpinnings of the Court's constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first [is] based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment . . . . *The second, grounded in the Supremacy Clause, Const., Art. VI, cl. 2*, and in the naturalization power, Art. I, § 8, cl. 4, *recognizes the Federal Government's primary responsibility in the field of immigration and naturalization.*" (Emphasis added.)

The Court then went on, without distinguishing between these two bases, to hold that, while the States have some discretion in adopting enactments restricting benefits to aliens, "[i]n each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Id.* at 605.

Following this analysis, the District Court here noted that that standard "is essentially the strict scrutiny analysis previously discussed in reference to the Equal Protection arguments"; and it held that since the University had failed to meet that standard in attempting to justify the discriminatory treatment of the respondent class of aliens under its policy, that policy violated the Supremacy Clause as well as the Equal Protection Clause (App. 47a).

The University argues that the principles of the foregoing cases do not apply to state action which discriminates only against nonimmigrants, which does not involve a "necessity of life," and which is harmonious with a federal statute or regulation (Pet. 21). As with the equal protection issue, however, the principles of the above decisions are not so limited. The University's policy violates those principles because it imposes a discriminatory burden on G-4 and similar nonimmigrant visaholders domiciled in Maryland by preventing them, but not citizens or immigrants domiciled in the State, from obtaining the benefits of in-state status.

The University also argues that the decisions below improperly fashioned "a rule automatically invalidating on supremacy clause grounds every asserted discrimination against an alien subclass" (Pet. 21). The courts below, however, constructed no such *per se* rule; they merely imposed the standard enunciated by this Court in *Examining Board* and, under that standard, found the University's form of discrimination against a sub-class of aliens to be wanting.

In any event, the Supremacy Clause holding of the courts below does not present a significant issue warranting this Court's review. Since the University's policy was held invalid on equal protection grounds, the Supremacy Clause holding was simply an additional ground for the same result. Indeed, even if the holdings below had es-

tablished a *per se* rule automatically invalidating on Supremacy Clause grounds every violation of the Equal Protection Clause, such a rule would be of little practical importance, since every enactment subject to such a rule would already be unconstitutional on equal protection grounds, and the Supremacy Clause ground would merely be cumulative.[10]

III. The Lower Courts' Holding That the University's Policy Violated the Due Process Clause Prior to June 23, 1978, Was Limited to a Two-Year Period and Does Not Warrant This Court's Review.

In their initial decisions in this case, the courts below held that the University's In-State Policy denied G-4 visaholders due process of law under the principles of *Vlandis* v. *Kline*, 412 U.S. 441 (1973). As in *Vlandis*, the University's policy purported to be concerned with domicile as the test for in-state status, but it then denied to a group of individuals seeking to meet that test—G-4 and other nonimmigrant visaholders—any opportunity to prove that they did so, on the basis of a conclusive presumption that they could not have the requisite intent to establish Maryland domicile. As the courts found, that conclusive presumption was not universally true for G-4 visaholders (since they can establish Maryland domicile), and so it violated the Due Process Clause under *Vlandis*.

On review of those decisions, this Court in *Elkins* confirmed that *Vlandis* governed this case: "Because petitioner makes domicile the 'paramount' policy considera-

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[10] While we do not argue the point here, we specifically preserve our position—rejected by the District Court (App. 44a-45a) but not addressed by the Court of Appeals—that the University's policy also violates the Supremacy Clause by penalizing G-4 visaholders on account of, and to the extent of, their tax exemption granted by international agreements to which the United States is a party and thereby interfering with an important objective of those agreements.

tion and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi* [422 U.S. 749, 771 (1975)] to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.'" 435 U.S. at 660 (App. 116a). In order to avoid a decision "on the continuing vitality of *Vlandis* . . . unless it is really necessary," *id.* at 661 (App. 117a), the Court certified to the Maryland Court of Appeals the "potentially dispositive" question whether G-4 visaholders could be domiciled in Maryland as a matter of state law, *id.* at 668 (App. 124a). After that court held that they could be so domiciled, and after the University had in the meantime adopted its Clarifying Resolution of June 23, 1978, the case returned to this Court. Without further briefing, this Court in *Toll* remanded the case to the District Court for further consideration in light of this Court's opinion in *Elkins*, the Maryland Court of Appeals decision, and the Clarifying Resolution. 441 U.S. at 462 (App. 160a).

On remand, the courts below reaffirmed that the University's policy violated the Due Process Clause under *Vlandis* but *only* for the period prior to the date of the Clarifying Resolution. That holding, therefore, affects only a two-year period—from the date of the District Court's initial order (July 13, 1976) until the date of the Clarifying Resolution (June 23, 1978).

Despite the limited nature of this due process holding, the University claims that it presents an important issue regarding the viability of the irrebuttable-presumption doctrine. That claim is erroneous.

The University argues that the lower courts have embraced a "constitutional doctrine repeatedly shunned by this Court and soundly rejected by many of the circuit

courts of appeals" (Pet. 22). In response, it should be noted first that, while the irrebuttable-presumption doctrine has been limited by this Court and by lower courts, this Court in *Elkins* made clear that *Vlandis* squarely governed the present case. The University contends, however, that this Court's subsequent decision in *Toll* in effect reversed its holding in *Elkins* and decided that *Vlandis* was inapplicable to this case and that no irrebuttable presumption ever existed, thus removing the issue from the case entirely (Pet. 24-25). As the courts below recognized, that is a patent misreading of *Toll*.

In *Toll* this Court first took note of the Clarifying Resolution and stated that it appeared to remove the premise of *Elkins* that if G-4 visaholders could become Maryland domiciliaries, the University "would redraft its policy 'to accommodate' G-4 aliens . . . ." 441 U.S. at 461 (App. 160a). The Court then stated that "*if* domicile is not the 'paramount' policy consideration of the University, this case is no longer 'squarely within *Vlandis* as limited by *Salfi* . . . .'" 441 U.S. at 461-62 (App. 160a) (emphasis added). The Court did not decide *whether*, in light of the Clarifying Resolution, domicile was in fact any longer the "paramount" consideration; and it manifestly did not decide, as the University claims it did, that the resolution retroactively changed the "paramount" nature of domicile, and thus resolved the due process issue in the University's favor, for the period *prior to the date of the resolution*. The Court left those questions as among the "new issues" to be "addressed in the first instance by the District Court." 441 U.S. at 462 (App. 160a).[11]

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[11] The University asserts that "if the Court though[t] that *Vlandis* still governed any of the rights and obligations of the parties in this case, it would have done what it said it would do, that is, consider the question of whether *Vlandis* as modified by *Salfi* should be 'overrule[d] or further limit[ed]'" (Pet. 25). That conclusion does not follow at all. This Court was faced with a new resolution which the University claimed showed a different basis

On remand, the courts below found that the Clarifying Resolution of June 23, 1978, did not retroactively change the University's paramount concern with domicile (under state law) for the period prior to that date (although it did afterwards). The courts therefore held that this case was still goverened by *Vlandis* for the period prior to June 23, 1978, but not afterwards. The University asks this Court to use that limited holding as a basis to review the irrebuttable-presumption doctrine as a whole and to overrule *Vlandis* (Pet. 26). Even apart from the merits of the question, this is hardly an appropriate case for the Court to undertake this task. The University's policy has been held invalid on equal protection and Supremacy Clause grounds for the entire period both before and after the Clarifying Resolution, and the due process holding simply provides an additional ground that is limited in effect to a two-year period over three years in the past—July 13, 1976, to June 23, 1978. The due process question thus does not have continuing importance in the context of the present case. Moreover, that question is unlikely to arise again, at least in similar circumstances. The only reason that the question originally arose is that the University tried to justify its policy on the ground that G-4 visaholders could not be domiciled in Maryland as a matter of state law. Since it is now clear that the denial of in-state benefits to such visaholders cannot be justified on that ground, the question should not arise again in the same way.

In light of all these circumstances, there is no good reason for this Court to review the due process holding of the courts below.

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for its In-State Policy from the one which the Court had previously found it had. The Court wanted to give the District Court the first opportunity to hear that claim and to address the questions of whether and how that resolution may have affected the issues.

IV. The Lower Courts' Holding That Refunds Are Appropriate Because the University Waived Its Eleventh Amendment Immunity Was Correctly Based on the University's Representations in This Case and Does Not Present a Substantial Question Warranting Review.

The District Court's order of May 30, 1980, besides reaffirming injunctive relief against enforcement of the University's In-State Policy, ordered the University to refund the difference between out-of-state and in-state charges to each class member whose status was determined by a G-4 visa for the fall semester of 1976 or for any subsequent semester and who would have been reclassified to in-state status but for the District Court's stay of its original order of July 13, 1976, pending appeal (¶ 6, App. 49a). The University's contention that this order violates the Eleventh Amendment was properly rejected by both courts below. In any event, since the issue turns on the construction of representations made by the University to obtain a stay of the original 1976 order, it presents no question of general significance meriting review by this Court.

The original order of July 13, 1976 (App. 98a) gave prospective relief only and thus raised no Eleventh Amendment issues. Had that order not been stayed, the University would immediately have had to cease charging affected class members the higher out-of-state tuition rate. Conversely, had a stay been granted without conditions, the University might have a valid argument that the Eleventh Amendment barred the District Court in 1980 from ordering refunds back to 1976. In fact, however, the 1976 order was stayed after a motion by the University in which it represented specifically that "plaintiffs will not suffer substantial harm if a stay is granted" (R. 439), and after an oral hearing at which the University's counsel made the representation, incorporated into the stay order itself, that in the event the court's injunctive order was "finally affirmed on appeal," the University would refund the relevant difference in

tuition to "each student whose status is currently determined by a G-4 visa and whose request for reclassification . . . would have been granted but for the stay" (App. 99a-100a).

The University does not deny that the condition attached to the stay order was an express waiver of Eleventh Amendment immunity. Rather, it argues (in its "first" and "third" points, Pet. 27 & 28-29) that the District Court's 1976 order was "effectively vacated" when this Court in *Toll* vacated the judgment of the Court of Appeals, and that thus that order can never be "finally affirmed on appeal" within the meaning of the original stay order. In addition, it argues (in its "second" point, Pet. 28) that, in any event, refunds for the period 1976 to 1978 are inappropriate. Both arguments are without merit.

1. The University's contention that this Court in *Toll* "effectively vacated" the 1976 order is inconsistent with the Court's language and with the logic of the situation. Respondents were defending the 1976 order in this Court on the due process ground that had been adopted by the courts below *and* on the equal protection and Supremacy Clause grounds that neither court had addressed. As shown above, this Court did not decide the due process question in the University's favor, and it plainly did not decide the equal protection and Supremacy Clause issues. Rather, it simply concluded that the intervening Clarifying Resolution raised "new issues of constitutional law which should be addressed in the first instance by the District Court." 441 U.S. at 462 (App. 160a). Accordingly, it "vacate[d] the judgment of the Court of Appeals"—not the judgment of the District Court—and "remand[ed] to the District Court for further consideration" in light of its opinion in *Elkins*, the Maryland Court of Appeals opinion, and the Clarifying Resolution. *Id.* This Court thus left it up to the District Court to decide whether, in light of the resolution, the due process ground still justified the injunction and, in any event,

whether the equal protection or Supremacy Clause arguments did so. It surely would not have vacated the 1976 order—and deprived the respondents of rights accruing under it—without addressing the various alternative grounds supporting it.

The University's contention that the case could not have been remanded for reconsideration without vacating the 1976 order (Pet. 27) ignores the broad authority granted by 28 U.S.C. § 2106 [12] and the fact that this Court has often remanded cases for reconsideration without vacating the underlying order or judgment. *E.g.*, *Goldberg* v. *United States*, 425 U.S. 94, 111-12 (1976), and *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961).[13] Accordingly, the 1976 order was "finally affirmed on appeal" when the District Court reaffirmed that order (though in part on different legal grounds) in 1980, or will be "finally affirmed on appeal" when the instant appeal is over.[14]

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[12] "The Supreme Court . . . may . . . require such further proceedings to be had as may be just under the circumstances."

[13] The University cites *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 268 (1936), for the proposition that an appellate court cannot leave in effect the final decree of a district court and at the same time reinvest that court with jurisdiction to retry the case (Pet. 27). But the statement in question in that opinion was limited to the peculiar facts of the case, where the court of appeals had issued an ambiguous remand order which had been misunderstood by the district court. No stay of the district court order had been issued in that case, and there was no issue, as here, of rights that might be lost by virtue of the Eleventh Amendment if the district court order were vacated. In any event, that decision preceded the enactment of 28 U.S.C. § 2106, as well as the adoption of Rule 60, F.R.C.P., which allows a district court to reconsider a matter without upsetting its original order.

[14] Since the District Court stayed the 1980 order pending appeal on the same grounds as it had stayed the 1976 order, there is little practical difference between the two approaches. The first approach makes sense because (a) the further District Court proceedings were mandated by this Court and thus may be considered a continu-

If the University's position were correct, the result would be illogical and unfair. If this Court denies certiorari or affirms, then in not one court will the University have prevailed on the merits. The 1976 order will have been upheld as properly entered. It is incredible, under these circumstances, that the University should contend that it cannot now or ever be ordered to pay the money it expressly promised to refund, if necessary, in 1976. The upshot of this argument is that the University won the entire case up to May 30, 1980, regardless of the decision on the substantive issues. Both the District Court, which had heard argument on and signed the original stay order, and the Court of Appeals, which had adopted that stay order when it stayed its own mandate (App. 103a-104a), properly rejected this unreasonable interpretation of the order. The University's effort to escape the manifest intent of its representations does not merit further review.

2. Finally, the University suggests that, at the very least, refunds for the period after June 23, 1978, should not have been ordered, because "the in-state policy had been declared constitutional on due process grounds after that date . . . and was not declared unconstitutional on different grounds until May 30, 1980" (Pet. 28). This argument, made without any citation of authority, ignores the procedural posture of the case and was properly rejected by both courts below.

The District Court declared the In-State Policy unlawful and enjoined its application in 1976. The fact that the legal ground announced at the time—due process—was later changed for the period after June 23, 1978—to equal protection and supremacy—is irrelevant. Plaintiffs were entitled to defend the 1976 order on any legal grounds that supported it (see, *e.g.*, *Colautti* v. *Franklin*,

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ation of the initial appeal and (b) neither this Court nor the Court of Appeals retained jurisdiction of the case, so a new appeal had to be taken by the University from the 1980 order.

439 U.S. 379, 397 n.16 (1979)), and they did so. An order that is later affirmed on different grounds still stands from the time it was entered.

The University's argument might make sense if the University had in 1978 adopted a *new* in-state policy, which was not covered by the 1976 order. But the University admits that the Clarifying Resolution did not change the policy or result in a new policy (Pet. 26), and the resolution itself states that it "reaffirms" the original In-State Policy (¶ 4, App. 174a). Thus, the In-State Policy before and after June 23, 1978, was subject to the 1976 order. Accordingly, the University must make refunds for the entire period after that order (if it does not prevail in this Court), because it waived Eleventh Amendment immunity by agreeing to the conditions of the 1976 stay order.

CONCLUSION

Five years after the respondents obtained an order holding the University's In-State Policy unlawful as applied to them, the policy remains in effect, even though the University has never prevailed on the merits in three tiers of federal courts or in the Maryland Court of Appeals. The case does not merit further review by this Court. For this reason and the other reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

ALFRED L. SCANLAN
JOHN TOWNSEND RICH
JAMES R. BIEKE *
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for Respondents

* Counsel of Record

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